

Proposed Amendments to Yellowstone County's Zoning Regulations

SEC. 27-611. SEXUALLY ORIENTED BUSINESSES.

- (a) Purpose and Intent. It is the purpose of this section to regulate sexually oriented businesses and related activities to promote the health, safety, morals, and the general welfare of the citizens of the City of Billings and Yellowstone County, and to establish reasonable uniform regulations to prevent the continued deleterious location and concentration of sexually oriented businesses within the City and County jurisdictions. The provisions of this section have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly it is not the intent or effect of these regulations to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, nor to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of these regulations to condone or legitimize the distribution of obscene materials.
- (b) Findings ~~and Determinations~~. The Billings City Council and Yellowstone County Commission hereby finds and determines that:

Based upon evidence concerning the adverse secondary effects of sexually oriented businesses on the community presented in hearings and reports made available to the City Council and Board of County Commissioners, and upon findings incorporated in the cases of *City of Renton v. Playtime Theatres, Inc.* 475 U.S.41 (1986); *Young v. American Mini Theatres*, 426 U.S. 50 (1976); and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Arcara v. Cloud Books, Inc.* 478 U.S. 697 (1986); *California v. LaRue*, 409 U.S. 109 (1972); *Iacobucci v. City of Newport, Ky.* 479 U.S. 92 (1986); *United States v. O'Brien*, 391 U.S. 367 (1968); *DLS Inc. v. City of Chattanooga*, 107 F 3rd 403(6th Cir. 1997); *Kev, Inc. v. Kitsap County*, 793 F. 2nd 1053 (9th Cir 1986); *Hang On Inc. v. City of Arlington*, 65 F. 3rd 1248 (5th Cir. 1995); *South Florida Free Beaches Inc. v. City of Miami*, 7344 F 2n 608 (11th Cir 1984); and *N.W. Enterprises v. City of Houston*, 27 F. Supp. 2d 754 (S.D. Tex. 1998), as well as studies conducted in other cities including but not limited to, Phoenix, Arizona; Minneapolis, Minnesota; Houston, Texas; Indianapolis, Indiana; Amarillo, Texas; Garden Grove, California; Los Angeles, California; Whittier, California; Austin, Texas; Seattle, Washington; Oklahoma City, Oklahoma; Cleveland, Ohio; and Beaumont, Texas; and findings reported in the Final Report of the Attorney General's Working Group on the Regulation of Sexually Oriented Businesses (June 6, 1989, State of Minnesota), and statistics obtained from the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, the City of Billings and Yellowstone Commission find that:

- (1) ~~The establishment of adult uses in business districts which are immediately adjacent to and which serve residential neighborhoods has a deleterious effect on both the business and residential segments of the neighborhood, causing or contributing to blight and a downgrading of property values.~~
- (2) ~~The establishment of more than two (2) adult uses within six hundred (600) feet of each other has a deleterious effect on surrounding residential and business areas and the fostering of such businesses within a close proximity tends to create a "skid row" atmosphere.~~
- (3) ~~The location of several adult uses in the same neighborhood tends to attract an undesirable quantity and quality of transients, a circumstance which adversely affects property values, causes an increase in crime and encourages residents and businesses to move elsewhere.~~
- (4) ~~Concern for, and pride in, the orderly planning and development of a neighborhood should be encouraged and fostered in those persons comprising residential and business segments of that neighborhood.~~

- (1) Sexually oriented business lend themselves to ancillary unlawful and unhealthy activities that are currently uncontrolled by the operators of the establishments. Further, there is currently

no mechanism to make owners of these establishments responsible for the activities that occur on their premises.

- (2) Crime statistics show that all types of crimes, especially sex-related crimes, occur with more frequency in neighborhoods where sexually oriented businesses are located. See, e.g. Studies of the cities of Phoenix, Arizona; Indianapolis, Indiana; and Austin, Texas.
- (3) Sexual acts, including masturbation, sadomasochistic abuse, and oral and anal sex, occur at sexually oriented businesses, especially those which provide private or semi-private booths or cubicles for viewing films, videos or live sex shows. See, e.g. *California v LaRue*, 409 U.S. 109, 111 (1972); See also Final Report of the Attorney General's Commission on Pornography (1986) at 377.
- (4) Offering and providing such booths and/or cubicles encourages such activities, which creates unhealthy conditions. See, e.g. Final Report of Attorney Generals' Commission on Pornography (1986) at 367-77.
- (5) Persons frequent certain adult theaters, adult arcades, and other sexually oriented businesses, for the purpose of engaging in sex within the premises of such sexually oriented businesses. See e.g. *Arcara v. Cloud Books Inc.* 478 U.S. 697, 698 (1986), see also Final Report of the Attorney General's Commission on Pornography (1986) at 376-77.
- (6) At least 50 (fifty) communicable diseases may be spread by activities occurring in sexually oriented businesses including, but not limited to, syphilis, gonorrhea, human immunodeficiency virus infection (HIV- AIDS), genital herpes, hepatitis B, Non A, Non B amebiasis, salmonella infections, and shigella infections. See, e.g. Study of Fort Meyers, Florida.
- (7) As of December 31, 1996, the total number of reported cases of AIDS in the United States caused by the human immunodeficiency virus (HIV) was 581, 429. See, e.g. Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention.
- (8) As of December 31, 1999, there have been 92 (ninety-two) reported cases of AIDS in the State of Montana for the years 1997 through 1999.
- (9) The total number of cases of genital Chlamydia trachomatis infection in the United States reported in 1997 was 526,653, an 8% increase over the year 1996. See, e.g. Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention.
- (10) The total number of cases of early (less than one year) syphilis in the United States reported during the twelve year period 1985-1997 was 387,233. See, e.g. Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention.
- (11) The number of cases of gonorrhea in the United States reported annually remains at a high level, with a total of 1,901,365 cases reported during the period 1993-1997. See e.g. Statistics of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention.
- (12) The Surgeon General of the United States, in his report of October 22, 1986, advised the American public that AIDS and HIV infection may be transmitted through sexual contact, intravenous drug use, exposure to infected blood and blood components, and from an infected mother to her newborn.
- (13) According to the best scientific evidence available, AIDS and HIV infection, as well as syphilis and gonorrhea, are principally transmitted by sexual acts. See, e.g. Findings of the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention.
- (14) Sanitary conditions in some sexually oriented businesses are unhealthy, in part, because the activities conducted therein are unhealthy, and, in part, because of the unregulated nature of the activities and the failures of the owners and operators of the facilities to self-regulate those activities and maintain those facilities. See, e.g. Final Report of the Attorney General's

Commission on Pornography (1986) at 377, and testimony to the Montana Senate Judiciary Committee February 9, 2001, in reference to SB399.

- (15) Numerous studies and reports have determined that bodily fluids, including semen and urine, are found in the areas of sexually oriented businesses where persons view "adult" oriented films. See, e.g., Final Report of the Attorney General's Commission on Pornography (1986) at 377.
- (16) Studies show nude dancing in adult establishments increases prostitution, increases sexual assaults, and attracts other criminal activity. See, e.g., Barnes v. Glen Theatre, 501 U.S. 560, 583 (1991).
- (17) Nude dancing in adult establishments increases the likelihood of drug dealing and drug use. See, e.g., Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1056 (9th Cir. 1986).
- (18) The findings noted in paragraphs numbered (1) through (17) raise substantial governmental concerns.
- (19) Sexually oriented businesses have operational characteristics which should be reasonably regulated in order to protect those substantial governmental concerns.
- (20) Removal of doors on adult booths and requiring sufficient lighting on the premises with adult booths advances a substantial governmental interest in curbing illegal and unsanitary sexual activity occurring in adult establishments.
- (21) The general welfare, health, morals and safety of citizens in the City of Billings and Yellowstone County will be promoted by enactment of this regulation.

(c) Definitions.

(1) Adult Arcade means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five (5) or fewer persons per machine at any one (1) time, and where the images so displayed are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas."

(2) Adult Book Store or Adult Video Store means a commercial establishment which, as one (1) of its principal business purposes, offers for sale or rental for any form of consideration any one (1) or more of the following:

- a. Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, video reproductions, slides, or other visual representations which are characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas"; or
- b. Instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

(3) Adult Motel means a hotel, motel, or similar commercial establishment which:

- a. Offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right-of-way which advertises the availability of this adult type of photographic reproductions;
- b. Offers a sleeping room for rent for a period of time that is less than ten (10) hours; or
- c. Allows a tenant or occupant of a sleeping room to sub-rent the room for a period of time that is less than ten (10) hours.

- (4) Adult Motion Picture Theater means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas."
- (5) Church or Other Place of Worship means a building which is used primarily for religious worship and related religious activities, including but not limited to churches, convents, monasteries, shrines, and temples.
- (6) City means the City of Billings, Montana.
- (7) County means Yellowstone County, Montana.
- (8) Establishment means and includes any of the following:
 - a. The opening or commencement of any sexually oriented business as a new business;
 - b. The conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;
 - c. The additions of any sexually oriented business to any other existing sexually oriented business; or
 - d. The relocation of any sexually oriented business.
- (9) Nudity or State of Nudity means a male appearing without clothing to conceal his genitals or anal cleft or a female appearing without clothing to conceal her breasts, genitals or anal cleft. A male or female's genitals or anal cleft are concealed when they are not visible. A female's breasts are concealed when her areolas and nipples are not visible.
- (10) Sexually Oriented Business means an adult bookstore, adult theater, adult motel, adult massage parlor, adult sauna, adult entertainment center, adult cabaret, adult health/sport club, adult steam room/bathhouse facility and/or nude dancing establishment.
- ~~(10) Sexually Oriented Business means an "adult" arcade, "adult" book store, "adult" video store, "adult" motel, or "adult" motion picture theater.~~
- (11) Specified Anatomical Area means the male genitals in a state of sexual arousal and/or the vulva or more intimate parts of the female genitals.
- (12) Specified Sexual Activities means and includes any of the following:
 - a. The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
 - b. Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
 - c. Masturbation, actual or simulated; or
 - d. Excretory functions as part of or in connection with any of the activities set forth in above (a) through (c).
- (13) Transfer of Ownership or Control of sexually oriented business means and includes any of the following:
 - a. The sale, lease, or sublease of the business;
 - b. The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange or similar means; or
 - c. The establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.
- (14) Viewing Room/Booth/Adult Arcade means a room or booth of less than one hundred fifty (150) square feet of floor space to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five (5) or fewer persons per machine at any one (1) time, and where the images so displayed are distinguished or characterized by an

emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas."

- (d) Classification. Sexually oriented businesses are classified as follows:
 - (1) Adult Arcades;
 - (2) Adult Book Stores or Adult Video Stores;
 - (3) Adult Motels; and
 - (4) Adult Motion Picture Theaters.
- (e) Location of Sexually Oriented Business.
 - (1) No person, whether as a principal or agent, clerk or employee, either for himself or any other person, or as an officer of any corporation, or otherwise, shall place, maintain, own, or operate any sexually oriented business within one thousand (1,000) feet of the following residential zones:
 - a. Agricultural Suburban (A-S) Zone;
 - b. Residential 15,000 (R-150) Zone;
 - c. Residential 9,600 (R-96) Zone;
 - d. Residential 8,000 (R-80) Zone;
 - e. Residential 7,000 Restricted (R-70R) Zone;
 - f. Residential 7,000 (R-70) Zone;
 - g. Residential 6,000 Restricted (R-60R) Zone;
 - h. Residential 6,000 (R-60) Zone;
 - i. Residential 5,000 (R-50) Zone;
 - j. Residential Multi-Family (RMF) Zone;
 - k. Residential Multi-Family - Restricted (RMF-R) Zone;
 - l. Residential Manufactured Home (RMH) Zone; or
 - m. Entryway Mixed Use (EMU) Zone.
 - (2) No person, whether as a principal or agent, clerk or employee, either for himself or any other person, or as an officer of any corporation, or otherwise, shall place, maintain, own, or operate any sexually oriented business within one thousand (1,000) feet of the following land uses:
 - a. Public library;
 - b. Public playground or park;
 - c. Public or private school and its grounds, from kindergarten through twelfth grade;
 - d. A state licensed family day care home, group day care home, or day care center; or
 - e. Church or other place of worship.
 - (3) No person, whether as a principal or agent, clerk or employee, either for himself or any other person, or as an officer of any corporation, or otherwise, shall place, maintain, own or operate any sexually oriented business within six hundred (600) feet of another sexually oriented business.
 - (4) For purposes of this section, specified distances will be measured in a straight line, without regard to intervening structures, from the property line of the sexually oriented business to the property line of the preceding land uses or zoning districts.
 - (5) In addition to the preceding requirements, sexually oriented businesses are permitted in the following zones only:
 - a. Central Business District (CBD) Zone;

- b. Highway Commercial (HC) Zone;
 - c. Controlled Industrial (CI) Zone; or
 - d. Heavy Industrial (HI) Zone.
- (f) Nonconforming Use - Amortization period established. (Refer to BMCC Section 27-405(G))

(g) Applicability. The provision of this section shall apply to all existing and future sexually oriented businesses. Pursuant to MCA 76-2-208 and Section 27-401 of these regulations, any such existing business that does not meet the zoning district restrictions or the distance limitations, may continue its existence as a nonconforming use; but such nonconforming use will be subject to curtailment by current state law and these regulations. If a sexually oriented business is nonconforming to these regulations and such use is discontinued or abandoned for a period of thirty (30) consecutive days the nonconforming status shall lapse and any subsequent use of the property shall conform to the regulations specified by this resolution/ordinance for the district in which such land is located.

(h) Sign Limitations. Notwithstanding any other city ordinance or county resolution, code or regulations to the contrary, it shall be unlawful for the operator of any sexually oriented business or any other person to erect, construct, or maintain any sign for the sexually oriented business other than the one (1) primary sign and one (1) secondary sign, as provided herein.

(1) Primary signs shall have no more than two (2) display surfaces. Each such display surface shall:

- (a) not contain any flashing lights;
- (b) be a flat plane, rectangular in shape;
- (c) not exceed seventy-five (75) square feet in area or the maximum size allowed under any other relevant city ordinance or county resolution, whichever is less; and
- (d) not exceed ten (10) feet in height or ten (10) feet in length or the maximum size allowed under any other relevant city ordinance or county resolution, whichever is less.

(2) Primary signs shall contain no photographs, silhouettes, drawings or pictorial representations of any type and may contain only the name of the business.

(3) Each letter forming a word on a primary sign shall be of solid color, and each letter shall be the same print-type, size and color. The background behind such lettering on the display surface of a primary sign shall be uniform and solid color.

(4) Secondary signs shall have only one (1) display surface. Such display surface shall:

- (a) be a flat plane, rectangular in shape;
- (b) not exceed twenty (20) square feet in area or the maximum size allowed under any other relevant city or county regulations, whichever is less;
- (c) not exceed five (5) feet in height and four (4) feet in width or the maximum size allowed under any other relevant city or county regulations, whichever is less; and
- (d) be affixed or attached to any wall or door of the business.

(5) Each sexually oriented business operation must post a sign on each door stating with "Adults only" or "No Minors Allowed".

(i) Operating Standards. All sexually oriented businesses shall operate in accordance with the following:

(1) No employee shall solicit business outside the building in which the business is located;

(2) All live entertainment in sexually oriented businesses shall be performed on a platform or other exclusive area provided for such purpose, and no entertainer or performer shall be permitted to leave such platform or area while entertaining or performing. This platform or other exclusive area shall be constructed in such a manner as to keep the performers at least nine (9) feet away from patrons;

(3) Nudity and specified sexual activities while on the premises of a sexually oriented business, other than adult motel, shall be prohibited. Nothing in these regulations shall be construed to prohibit a person from appearing in a state of nudity while using a restroom. Restrooms may not contain video reproduction equipment or be used in any way to circumvent this zoning regulation;

(4) No sexually oriented business shall operate between the hours of 12:01 am and 9:00 am;

(5) No sexually oriented business, other than an adult motel, shall be located in any building where alcoholic beverages are dispensed or consumed; and

(6) No minors shall be allowed in sexually oriented businesses.

(j) Operating Standards that Pertain to Establishments that Exhibit Sexually Explicit Films, Videos or any other Images. A sexually oriented business which exhibits on the premises in a viewing room of less than one hundred fifty (150) square feet of floor space, a film, video cassette, other video reproduction that specified sexual activities or specified anatomical areas, shall comply with the following requirements:

(1) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of the entire area of the premises to which any patron is permitted access for any purpose, excluding restrooms. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of the entire area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations, excluding restrooms. The view required in this subsection must be direct line of sight from the manager's station;

(2) No opening or holes of any kind shall exist between viewing booths/rooms or adult arcades;

(3) No doors shall be allowed on viewing booths/rooms or adult arcades;

(4) The premises shall be equipped with and have in continuous operation, while patrons are present, overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than five (5.0) foot-candle as measured at the floor level; and

(5) All floor coverings and walls in viewing booths/rooms and adult arcades are to be constructed of nonporous, easily cleanable surfaces, with no rugs or carpeting.

(k) Building Exterior Appearance.

(1) It shall be unlawful for an owner or operator of sexually oriented business to allow merchandise or activities of the establishment to be visible from outside the establishment.

(2) It shall be unlawful for the owner or operator of a sexually oriented business to allow the exterior portion of the sexually oriented business to have flashing lights, words, lettering, photographs, silhouettes, drawings, or pictorial representations of any type except to the extent permitted by the provisions of this section.

(3) It shall be unlawful for the owner or operator of a sexually oriented business to allow exterior portions of the establishment to be painted any color other than a single monochromatic color. This provision shall not apply to a sexually oriented business if the following conditions are met:

(a) The establishment is part of a commercial multi-unit center; and;

(b) The exterior portions of each individual unit in the commercial multi-unit center, including the exterior portions of the business, are painted the same color as one another or are painted in such a way so as to be a component of the overall architectural style or pattern of the commercial multi-unit center.

(4) Nothing in this section shall be construed to require painting of an otherwise unpainted exterior portion of a sexually oriented business.